SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 27, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Andrias, Moskowitz, Renwick, Richter, JJ.

1281-
1281A The People of the State of New York, Respondent,

Ind. 5663/06
3616/06

-against-

Manuel Vasquez,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Martin J. Foncello of counsel), for respondent.

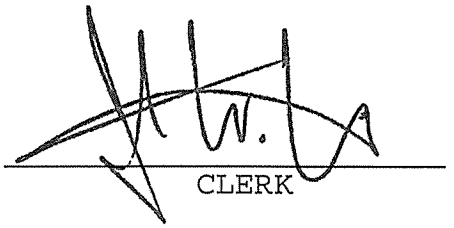
Judgments, Supreme Court, New York County (William A. Wetzel, J.), rendered September 29, 2008, convicting defendant, upon his pleas of guilty, of attempted burglary in the first degree and grand larceny in the fourth degree, and sentencing him to an aggregate term of 3½ years, unanimously reversed, on the law, the plea vacated and the matter remanded for further proceedings.

Defendant entered his guilty pleas in consideration of a promise that he would receive a sentence to run concurrently with the sentence to be imposed for his conspiracy convictions under another indictment. As the People concede, since those

convictions have been set aside, defendant is entitled to withdraw his pleas (*see People v Rowland*, 8 NY3d 342 [2007]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 27, 2009



CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Renwick, Richter, JJ.

1282 Gina Mullins, etc., Index 401399/06
Plaintiff-Appellant,

-against-

East Haven Nursing and Rehabilitation Center, LLC, etc., et al.,
Defendants,

New York City Health and Hospitals Corporation,
Defendant-Respondent.

Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Victoria Scalzo of counsel), for respondent.

Order, Supreme Court, New York County (Stanley L. Sklar, J.), entered May 28, 2008, which granted the motion of defendant New York City Health and Hospitals Corporation to dismiss plaintiff's complaint, on the grounds that plaintiff failed to timely file a notice of claim, unanimously affirmed, without costs.

While plaintiff's decedent was still living, a notice of claim and an amended notice of claim, alleging medical malpractice, were filed more than 90 days after his last scheduled medical appointment. Thereafter, an action alleging conscious pain and suffering was brought on his behalf in the name of a guardian.

The seventy-three-year-old decedent died on May 23, 2005.

However, plaintiff had not only failed to timely file a notice of claim, but never made an application for leave to file a late notice of claim.

That plaintiff's decedent may have been under a disability (insanity) did not toll the necessity of filing a timely notice of claim; it tolled only the time in which to apply for leave to serve a late notice of claim (*see Noel v Shahbaz*, 274 AD2d 381, 382 [2000]). Even with the toll, plaintiff's time to seek leave to serve a late notice expired, at the latest, one year and 90 days after decedent's death, or August 21, 2006. Having failed to move within that time, the IAS court was without discretion to excuse the failure to file a notice of claim within 90 days of the alleged malpractice, and the complaint alleging conscious pain and suffering was properly dismissed (*see Pierson v City of New York*, 56 NY2d 950 [1982]; *McGarty v City of New York*, 44 AD3d 447 [2007]).

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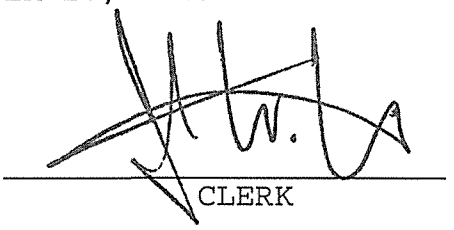


CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Renwick, Richter, JJ.

1284 In re Errol S., Jr. and Another,

Dependent Children under the
Age of Eighteen Years, etc.,

Errol S.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

Geoffrey P. Berman, Larchmont, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Scott Shorr of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Louise Feld of counsel), Law Guardian.

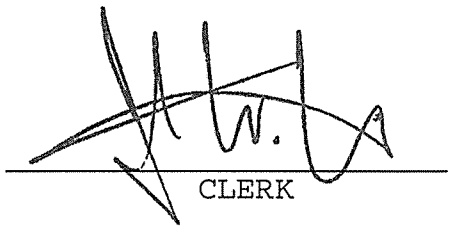
Order, Family Court, Bronx County (Clark V. Richardson, J.), entered on or about June 25, 2008, which, upon a finding that respondent father neglected the subject children, released the children to their mother and permitted weekly visits between respondent and the children, unanimously affirmed, without costs.

The finding of neglect was supported by a preponderance of the evidence, including testimony that respondent committed acts of domestic violence against the mother often in the children's presence (Family Court Act § 1012[f][i][B]). These violent acts, including threatening the mother with a firearm, which was witnessed by one of the children while the other child slept

nearby, exposed the children to an imminent risk of harm (*see Matter of Elijah C.*, 49 AD3d 340 [2008]; *Matter of Andrew Y.*, 44 AD3d 1063, 1064 [2007]), and there exists no basis to disturb the court's credibility determinations (*see Matter of Irene O.*, 38 NY2d 776 [1975]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 27, 2009



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Mazzarelli, J.P., Andrias, Moskowitz, Renwick, Richter, JJ.

1285 In re Shirley E. Daniels, Index 401018/08
Petitioner-Appellant,

-against-

New York City Housing Authority,
Respondent-Respondent.

The Legal Aid Society, New York (Sateesh K. Nori of counsel), and Akin Gump Strauss Hauer & Feld LLP, New York (Ryan N. Marks of counsel), for appellant.

Sonya M. Kaloyanides, New York (Corina L. Leske of counsel), for respondent.

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered August 19, 2008, which denied the petition to annul respondent's determination, dated April 9, 2008, denying petitioner's application to succeed to the tenancy of her deceased mother as a remaining family member, confirmed the determination, and dismissed the proceeding, unanimously affirmed, without costs.

The determination that petitioner was not a remaining family member and therefore not entitled to succession rights to the subject apartment was not arbitrary and capricious (CPLR 7803[3]). Petitioner had not resided in the apartment with her mother, with respondent's written permission, continuously for one year before her mother's death (*see Matter of Pelaez v New York City Hous. Auth.*, 56 AD3d 325 [2008]; *Matter of Torres v New York City Hous. Auth.*, 40 AD3d 328 [2007]). Indeed, her

application for permission to rejoin the household was not submitted until approximately six months before her mother's death.

The notice requirement is not a rule or regulation but a provision of the Housing Authority's remaining-family-member policy, and, in any event, petitioner is not a tenant of record. Nor has petitioner demonstrated any necessity for a further hearing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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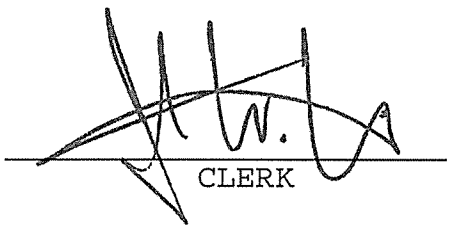

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Mazzarelli, J.P., Andrias, Moskowitz, Renwick, Richter, JJ.

1286 The People of the State of New York, Ind. 682/06
Respondent,

-against-

Albert Borreo,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

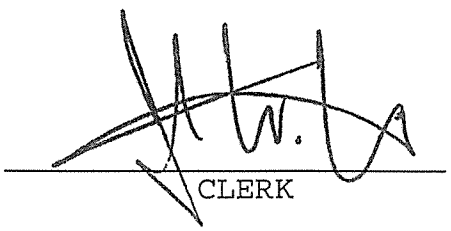
Robert M. Morgenthau, District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

Order, Supreme Court, New York County (Michael J. Obus, J.), entered on or about October 3, 2008, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-c), unanimously affirmed, without costs.

Defendant did not establish any special circumstances warranting a downward departure from his presumptive risk level (*see People v Guaman*, 8 AD3d 545 [2004]). The mitigating factors asserted by defendant were adequately taken into account by the analysis under the Risk Assessment Guidelines.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 27, 2009



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Mazzarelli, J.P., Andrias, Moskowitz, Renwick, Richter, JJ

1287-
1287A Vanlex Stores, Inc.,
Plaintiff-Appellant,

Index 107277/04

-against-

BFP 300 Madison II LLC, et al.,
Defendants-Respondents.

Finkelstein Newman Ferrara LLP, New York (Mark A. Chapman of counsel), for appellant.

Fried, Frank, Harris, Shriver & Jacobson LLP, New York (Eric A. Hirsch of counsel), for respondents.

Judgment, Supreme Court, New York County (Walter B. Tolub, J.), entered October 7, 2008, in an action alleging, inter alia, breach of a lease, dismissing the amended complaint pursuant to an order, same court and Justice, entered October 6, 2008, which granted defendants' motion for summary judgment and denied plaintiff's cross motion for summary judgment on its fourth cause of action, unanimously affirmed, with costs. Appeal from the aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The motion court properly determined that defendants were permitted to restrict the use of the retail space in the subject building offered to plaintiffs and further, that defendants had no obligation to offer plaintiff such retail space on the same terms offered to another commercial tenant, as plaintiff's rights to a first offer had not yet accrued. Section 39.05 of the 1996

lease clearly and unambiguously granted defendants the discretion to dictate the terms upon which plaintiff would be allowed to return following the construction of the new building. This clear and complete writing must be enforced according to its plain terms (*see Nola Realty LLC v DM & M Holding L.L.C.*, 33 AD3d 523, 526 [2006]), without reference to parol or extrinsic evidence (*see W.W.W. Assoc. v Giancontieri*, 77 NY 2d 157, 162-163 [1990]). Furthermore, the implied covenant of good faith and fair dealing inherent in every contract cannot be used to create terms that do not exist in the writing (*see National Union Fire Ins. Co. of Pittsburgh, Pa. v Xerox Corp.*, 25 AD3d 309, 310 [2006], *lv dismissed* 7 NY3d 886 [2006]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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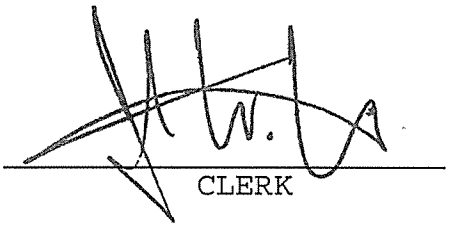

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Mazzarelli, J.P., Andrias, Moskowitz, Renwick, Richter, JJ.

1288 The People of the State of New York, Ind. 3696/07
Respondent,

-against-

Matthew Chacko,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Carol A. Zeldin of counsel), for appellant.

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered November 29, 2007, convicting defendant, upon his plea of guilty, of attempted criminal possession of a forged instrument in the second degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 three years, unanimously affirmed.

Defendant's argument that his plea was rendered involuntary by the court's failure to mention the mandatory surcharges and fees during the plea allocution is unavailing. The subject assessments are neither a penalty nor incorporated into a defendant's sentence and thus, do not need to be pronounced (*see*

People v Hoti, 12 NY3d 742 [2009]; *People v Guerrero*, 12 NY3d 45 [2009]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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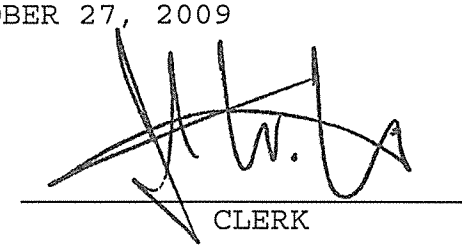

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Mazzarelli, J.P., Andrias, Moskowitz, Renwick, Richter, JJ.

1289 Hilda Rodriguez, as mother and natural guardian of Anthony Cuevas, etc., Plaintiff-Respondent, Index 16856/06

-against-

Joshua Waldman, et al., Defendants-Appellants,

Samuel Oberlander, et al., Defendants.

Heidell, Pittoni, Murphy & Bach, LLP, New York (Daniel S. Ratner of counsel), for appellants.

Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph of counsel), for respondent.

Order, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered February 20, 2009, which, to the extent appealed from, denied the motion of defendants Joshua Waldman and Associates for Women's Care for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendants-appellants dismissing the complaint as against them.

Defendants made a prima facie showing that they were not negligent in treating plaintiff and that their conduct did not proximately cause her son's injuries. In opposition to the motion, plaintiff failed to raise a triable issue of fact as to causation. Her first expert's opinion, without elaboration, that

defendants' "deviations from accepted standards of medical care in 1998 were directly responsible for causing or contributing to the sequelae experienced by" plaintiff's son, was conclusory (*see e.g. Huffman v Linkow Inst. for Advanced Implantology, Reconstructive & Aesthetic Maxillo-Facial Surgery*, 35 AD3d 214, 217 [2006]).

While plaintiff's second expert's opinion was not as conclusory, he "failed to controvert a number of points in defendant's expert affirmation" (*Abalola v Flower Hosp.*, 44 AD3d 522, 522 [2007]; *see also, e.g., Moore v New York Med. Group, P.C.*, 44 AD3d 393, 397 [2007], *lv dismissed* 10 NY3d 740 [2008]). Furthermore, his assertion that plaintiff's son had decreased cord blood pH is not supported by the record *(see e.g. Vera v Montefiore Med. Ctr.*, 60 AD3d 408 [2009]).

In sum, as in *Feliz v Beth Israel Med. Ctr.* (38 AD3d 396, 397 [2007]), plaintiff failed "to address adequately defendant's prima facie showing ... that there was ... no hypoxia."

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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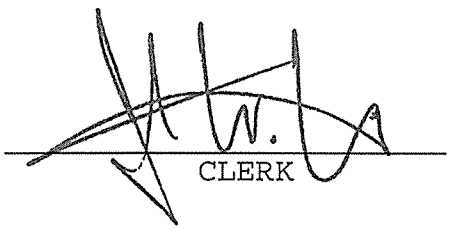

Mazzarelli, J.P., Andrias, Moskowitz, Renwick, Richter, JJ.

1290 The People of the State of New York, Ind. 8143/02
Respondent,

-against-

John Lingle,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Barbara Zolot of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Vincent Rivellese of counsel), for respondent.

Judgment of resentence, Supreme Court, New York County (Charles J. Tejada, J.), rendered June 27, 2008, resentencing defendant, as a second felony offender, to concurrent terms of 14 years and 3½ to 7 years with 5 years' post-release supervision, unanimously affirmed.

The court properly resentenced defendant to comply with the requirement that a term of post-release supervision be part of the court's oral pronouncement of sentence. Defendant's challenges to his resentencing are similar to arguments rejected by this Court in *People v Hernandez* (59 AD3d 180 [2009], *lv granted* 12 NY3d 817 [2009]). In addition, since defendant was resentenced while still serving his prison sentence, his claim that he had a legitimate expectation of finality in his original defective sentence is even weaker than the argument made in *Hernandez*. We also note that defendant was one of the defendants

in *People v Sparber* (10 NY3d 457 [2008]), and his resentencing for the purpose of orally imposing post-release supervision was expressly mandated by the Court of Appeals.

To the extent defendant is requesting a reduction of his prison sentence as a matter of discretion in the interest of justice, we find that request both procedurally improper on the present appeal and without merit.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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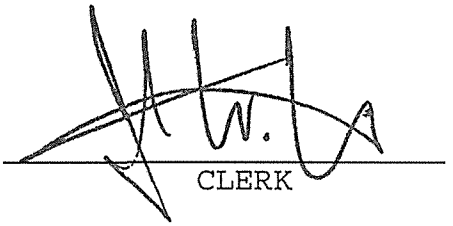

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Mazzarelli, J.P., Andrias, Moskowitz, Renwick, Richter JJ.

1292 Nzingha Ewadi, Index 8337/05
Plaintiff-Appellant,

-against-

The City of New York, et al.,
Defendants-Respondents,

Camila Lopez,
Defendant.

Scarcella Law Offices, White Plains (M. Sean Duffy of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Jane L. Gordon of counsel), for respondents.

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered July 10, 2008, which, insofar as appealed from as limited by the briefs, in this action for personal injuries sustained in a building fire, granted the motion of defendants-respondents (City) for reargument and renewal of an order, same court and Justice, entered March 18, 2008, granting plaintiff's motion to strike the City's answer, and upon renewal, modified its prior order, and in lieu of striking the answer, imposed a monetary sanction of $7,500 upon the City for its noncompliance and lack of diligence with regard to prior court orders, unanimously affirmed, without costs.

The court appropriately modified its prior order striking the City's answer and instead imposed a monetary sanction upon the City. Plaintiff failed to demonstrate that the City's

failure to produce an inspector, who allegedly inspected the subject building several months prior to the fire and found numerous dangerous and defective conditions in the building and did not warn plaintiff of them or demand that she be removed from the premises, was willful, contumacious, or in bad faith (*see Palmenta v Columbia Univ.*, 266 AD2d 90, 91 [1999]). The City was not obligated to produce a witness who is not under its control (*see Schneider v 17 Battery Place N. Assoc. II*, 289 AD2d 164, 165 [2001]), and the employee at issue here had left the City's employ approximately 10 months prior to the order directing that he be produced for deposition.

Furthermore, "[a] municipality has the right to determine which of its officers with knowledge of the facts may appear for pretrial examination" (*Colicchio v City of New York*, 181 AD2d 528, 529 [1992]). Having complied with the first preliminary conference order, the City was not required to produce additional witnesses for deposition until plaintiff made the appropriate showing and a court granted an order directing it to do so. The first time that occurred here was in January 2006, and by August 2007, the City notified plaintiff that the inspector no longer worked for the City and provided his last known address. Although the City took approximately 18 months to notify plaintiff that the former inspector was no longer in its employ,

the court imposed a substantial monetary penalty for this lack of diligence.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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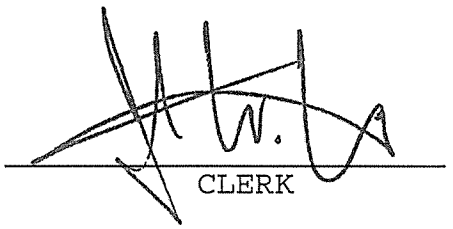

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Mazzarelli, J.P., Andrias, Moskowitz, Renwick, Richter, JJ.

1293 Daniella Smith, Index 350239/05
Plaintiff-Respondent,

-against-

Richard Smith,
Defendant-Appellant.

Myrna Felder, New York, for appellant.

Moses Preston & Ziegelman, LLP, New York (Robert M. Preston of counsel), for respondent.

Order, Supreme Court, New York County (Harold B. Beeler, J.), entered on or about January 9, 2009, which, after a nonjury trial, awarded plaintiff a sum equal to 50% of the value of the apartment owned by defendant prior to the marriage upon a finding that defendant breached the terms of an antenuptial agreement, unanimously reversed, on the law, without costs, the award vacated and the matter remanded for further proceedings consistent herewith.

At issue is the meaning of a provision in an antenuptial agreement providing that defendant "shall cause the cooperative or condominium which he intends to purchase, with his funds, as the primary residence of the parties to be held in joint names of the parties with right of survivorship." The court determined that it was unable to give effect to this provision as written, and that it required extrinsic evidence of the parties' intentions on this issue. After holding a non-jury trial, the

court found that the provision imposed an affirmative duty on defendant's part to fulfill his stated intention of buying a new apartment in the parties' joint names, that defendant had breached that duty, and, as a remedy for the breach, the court awarded plaintiff a sum equal to 50% of the value of the apartment owned by defendant prior to the marriage.

We disagree with the trial court's conclusion that the subject provision was ambiguous. A contract is unambiguous if the language it uses has "a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (*Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355 [1978]). Here, the intent to purchase clause did not create an enforceable obligation, as a mere statement of an intention, even if expressed unconditionally and unequivocally does not, on its own, give rise to a binding contract (*see Adams v Gillig*, 199 NY 314 [1910]). This reading of the provision is consistent with other terms of the agreement, specifically § D(ii) of Article 8, which provided that if no jointly owned marital residence is held at the termination of the parties' marriage, defendant is required to pay to plaintiff $500,000, if such termination occurs within the first five years of the marriage and $1,000,000 if such termination occurs after the fifth anniversary of the marriage. There is no basis to

deviate from the agreement as written.

Given this bargained for payment, as well as the other financial provisions included in the agreement for the benefit of plaintiff in the event the marriage terminated, there was no basis for the court's conclusion that plaintiff's waiver of spousal support or maintenance must have been premised on a guarantee of a joint share in a marital residence. Nor did plaintiff provide any other basis for a contractual right to half the equity in defendant's pre-marital apartment.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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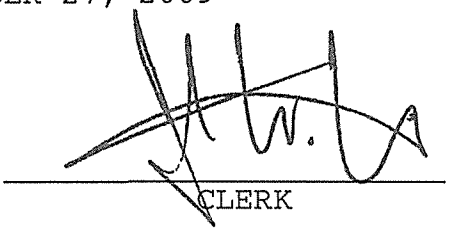

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Mazzarelli, J.P., Andrias, Moskowitz, Renwick, Richter, JJ.

1294 The People of the State of New York, Ind. 2884/07
Respondent,

-against-

Derrick White,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), and Foley & Lardner LLP, New York (Jonathan H. Friedman of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Mary C. Farrington of counsel), for respondent.

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered April 8, 2008, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him, as a second violent felony offender, to a term of 6 years, unanimously affirmed.

The court properly declined to submit third-degree assault as a lesser included offense, since there was no reasonable view of the evidence, viewed most favorably to defendant, that the victim's physical injuries were caused by something other than being struck with a glass bottle that shattered in his face (*see People v Joseph*, 23 AD3d 174, 175 [2005], *lv denied* 6 NY3d 777 [2006]). The location and extent of the injuries, as established by photographs, were incompatible with defendant's alternate theories of causation, and we reject defendant's argument to the contrary. Defendant failed to preserve his additional argument

that the court's submission to the jury of certain other counts of the indictment required the further submission of third-degree assault as a lesser included offense, and we decline to review it in the interest of justice.

Defendant did not preserve his challenges to the court's justification charge, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. The court was not required to instruct the jury on the justifiable use of nondeadly force because, even when considered in the light most favorable to defendant, there was no reasonable view of the evidence that he used anything less than "force which, under the circumstances in which it [was] used, [was] readily capable of causing death or other serious physical injury" (Penal Law § 10.00[11]) when he threw the bottle at the victim's face (*see generally People v Bulla*, 13 AD3d 118 [2004], *lv denied* 4 NY3d 762 [2005]). Moreover, in order to convict defendant of second-degree assault by means of a dangerous instrument (*see* Penal Law § 120.05[2]), the jury essentially had to find that he used deadly force (*see People v Garcia*, 59 AD3d 211 [2009], *lv denied* 12 NY3d 853 [2009]; *People v Mickens*, 219 AD2d 543 [1995], *lv denied* 87 NY2d 904 [1995]). Furthermore, the court's instructions adequately conveyed the principle that if the jury found that defendant was not guilty of a greater charge on the basis of justification, it was not to consider any lesser

counts (*see People v Palmer*, 34 AD3d 701, 703 [2006], *lv denied* 8 NY3d 848 [2007]). The difference between the court's instruction on this subject and the one suggested by defendant on appeal is a matter of form rather than substance.

Defendant's ineffective assistance of counsel claim is based on his attorney's failure to challenge the two portions of the court's justification charge discussed above. On the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that his counsel's failure to raise these issues was unreasonable, or that there was any reasonable possibility that the verdict would have been more favorable to defendant if the court had instructed the jury in accordance with his present claims.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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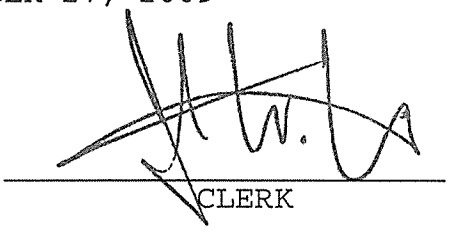


CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Renwick, Richter, JJ.

1295 Loryn Kass, Index 603995/06
Plaintiff-Respondent,

-against-

David J. Grais, et al.,
Defendants-Appellants.

Grais & Ellsworth LLP, New York (Molly L. Pease of counsel), for appellants.

Tannenbaum Helpern Syracuse & Hirschtritt LLP, New York (David J. Kanfer of counsel), for respondent.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered October 31, 2008, which granted plaintiff's motion for summary judgment, denied defendants' cross motion for such relief, and declared that plaintiff effectively revoked her offer to purchase certain residential property, unanimously affirmed, with costs.

Some 20 minutes after plaintiff had notified defendants' attorney that she was withdrawing her offer to purchase certain residential property owned by them, the fully executed contract was delivered by Federal Express. Defendants have insisted on enforcing the contract, invoking the so-called mailbox rule, which, in the context of contract law, stands for the proposition that a contract is considered to have been made at the time a

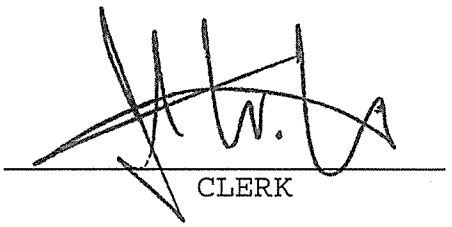
letter of acceptance is placed in possession of the postal service and not when actually received. Plaintiff thereupon commenced this action for a declaration that the contract was of no force and effect.

Although the mailbox rule has never been extended to encompass the delivery of a contract by Federal Express, defendants propose applying the rule to this purchase contract, notwithstanding the postdating of such contract to the date of delivery. Pursuant to section 25 of the purchase contract, "any notice to Escrowee shall be deemed given only upon receipt by Escrowee and each Notice delivered in person or by overnight courier shall be deemed given when delivered." It is undisputed that plaintiff withdrew her offer to purchase defendants' property before the fully executed contract was delivered. Defendant argues for excluding the executed contract from the ambit of section 25 because that provision uses the word "notice." To the extent section 25 could be considered ambiguous, which it is not (*see Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002]), it is well settled that any

ambiguity must be construed in plaintiff's favor and against defendants, who drafted it (*see Matter of Cowen & Co. v Anderson*, 76 NY2d 318, 323 [1990]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 27, 2009



CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Renwick, Richter, JJ.

1296 The People of the State of New York, Ind. 6316/06
Respondent,

-against-

Sean Duffy,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Cleary Gottlieb Steen & Hamilton LLP, New York (Joon H. Kim of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Patrick J. Hynes of counsel), for respondent.

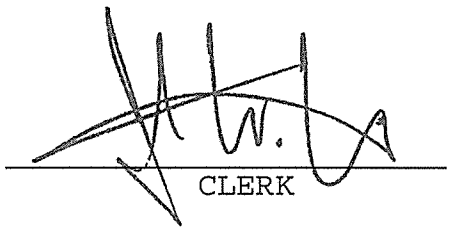
Judgment, Supreme Court, New York County (Daniel Conviser, J.), rendered March 11, 2008, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender whose prior conviction was a violent felony, to a term of 6 years, to be followed by a 3 year term of post-release supervision, unanimously reversed, on the law, defendant's motion to suppress granted and the indictment dismissed.

As the People concede, defendant is entitled to suppression of evidence recovered by way of a manual body cavity search

conducted without a warrant or exigent circumstances (*see People v Hall*, 10 NY3d 303 [2008], *cert denied* __US__, 129 S Ct 159 [2008]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 27, 2009



Mazzarelli, J.P., Andrias, Moskowitz, Renwick, Richter, JJ.

1297 The People of the State of New York, Ind. 4418/04
Respondent,

-against-

Jose Medina,
Defendant-Appellant.

Richard M. Weinstein, New York, for appellant.

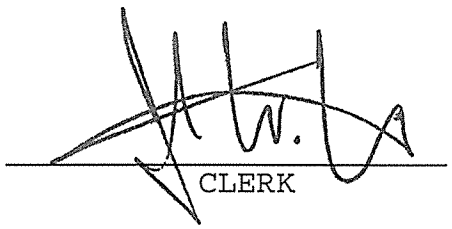
Robert M. Morgenthau, District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered June 1, 2005, convicting defendant, after a jury trial, of robbery in the first and second degrees, and sentencing him, as a second violent felony offender, to an aggregate term of 25 years, unanimously affirmed.

Defendant's arguments are similar to arguments we rejected on a codefendant's appeal (*People v Rodriguez*, 50 AD3d 476 [2008], *lv denied* 10 NY3d 963 [2008]), and we reach the same conclusions here.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 27, 2009



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Mazzarelli, J.P., Andrias, Moskowitz, Renwick, Richter, JJ.

1300 Tracy Tiefenthaler, Index 100543/07
Plaintiff-Appellant,

-against-

Mohammed Islam, et al.,
Defendants-Respondents.

Stephen R. Loeb, New York (Lawrence B. Lame of counsel), for appellant.

Thomas Torto, New York (Jason Levine of counsel), for respondents.

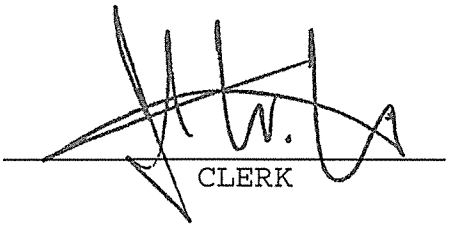
Order, Supreme Court, New York County (Paul Wooten, J.), entered November 28, 2008, which granted defendants' motion for summary judgment dismissing the complaint and denied plaintiff's cross motion for summary judgment on the issue of liability, unanimously affirmed, without costs.

Defendant driver's testimony was uncontroverted that he proceeded into the intersection when the traffic light turned green and a few seconds later his taxi was struck on the left side by a vehicle that had entered the intersection against a red light and that he did not see until the moment of the collision. Plaintiff maintains that, contrary to the motion court's finding, she did not concede that the taxi's light was green. However, she presented no evidence that the light was not green. Indeed, she testified that she did not see the light at all because she was looking at her cell phone. Thus, contrary to plaintiff's

contention, defendant, who had the right of way, was entitled to anticipate that other vehicles would stop at the red lights against them, and he had no duty to watch for and avoid one that failed to do so *(see Dinham v Wagner*, 48 AD3d 349 [2008]). Moreover, plaintiff's contention that defendant could or would have seen the other vehicle had he looked to his left before entering the intersection is purely speculative. Nor does the fact that the taxi was in the extreme right lane when the collision occurred raise an issue of fact as to defendant's attentiveness.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 27, 2009



Mazzarelli, J.P., Andrias, Moskowitz, Renwick, Richter, JJ.

1301N-
1302N-
1302NA

Index 601890/09

Cargill Financial Services International, Inc.,
Plaintiff-Appellant,

-against-

Bank Finance and Credit Limited also known as OJSC Bank Finance and Credit,
Defendant-Respondent.

Dorsey & Whitney LLP, New York (Jonathan M. Herman of counsel), for appellant.

Leader & Berkon, LLP, New York (Michael J. Tiffany of counsel), for respondent.

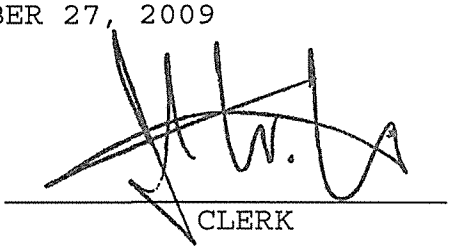
Three orders, Supreme Court, New York County (Charles E. Ramos, J.), entered July 7, 2009, which, as corrected and memorialized in an order entered August 5, 2009, denied plaintiff's application for an order of attachment of defendant's correspondent accounts located in New York and vacated a TRO previously granted by the court, unanimously affirmed, with costs. The temporary restraining order, which was extended by order of this Court entered September 8, 2009, is vacated.

While plaintiff's evidence established a basis for quasi in rem jurisdiction, in that defendant, a Ukranian bank, utilized its New York correspondent accounts to receive funds and make interest payments pursuant to the terms of the parties' loan agreements and associated letters of credit (*see generally Banco*

Ambrosiano v Artoc Bank & Trust, 62 NY2d 65 [1984]), plaintiff failed in its burden to show the extent, if any, that defendant had an attachable ownership interest in the subject correspondent accounts (*see e.g. Sigmoil Resources v Pan Ocean Oil Corp. (Nigeria)*, 234 AD2d 103 [1996], *lv dismissed* 89 NY2d 1030 [1997]). As such, the court properly exercised its discretion to deny plaintiff's attachment application (*see J.V.W. Inv. Ltd. v Kelleher*, 41 AD3d 233 [2007]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 27, 2009



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Mazzarelli, J.P., Andrias, Moskowitz, Renwick, Richter, JJ.

1303N Nidia Deltejo, Index 23210/02
Plaintiff-Appellant,

-against-

St. Nicholas Venture Inc., et al.,
Defendants-Respondents.

Bader, Yakaitis & Nonnenmacher, LLP, New York (Robert E. Burke of counsel), for appellant.

Curan, Ahlers, Fiden & Norris, LLP, New York (Robert J. Eisen of counsel), for respondents.

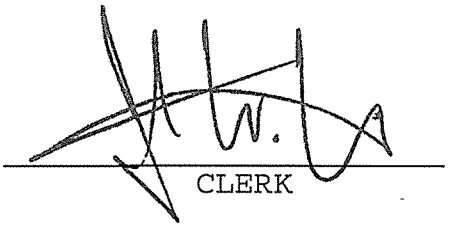
Order, Supreme Court, Bronx County (Howard R. Silver, J.), entered on or about March 16, 2009, which dismissed the action as abandoned, unanimously reversed, on the law, the facts and in the exercise of discretion, without costs, and the complaint reinstated.

Appellate review of the dismissal of an action is normally available only after the grant of a motion for such relief, or the denial of a motion to vacate or modify the dismissal order. Because the dismissal order, under CPLR 3404, did not result from an order on notice, it is not appealable as of right. However, we deem the notice of appeal to be a motion for leave to appeal, and exercise our discretion (CPLR 5701[c]) to grant leave and consider the merits of this appeal (*see Jun-Yong Kim v A&J Produce Corp.*, 15 AD3d 251 [2005]; *Mulligan v New York Cornell Med. Ctr.*, 304 AD2d 492 [2003]).

The matter is restored to the trial calendar without prejudice to defendants' seeking preclusion relief. It is apparent that another Justice on a prior motion for restoration had intended that the matter go to trial, and that if plaintiff could not produce certain medical evidence, defendants' remedy would be issue preclusion, not an order striking the complaint. Defendants argue that the prior order was wrongly decided and the motion to restore should have been denied outright. However, defendants did not appeal from that order, and in any event, their argument is without merit (*see Burgos v 2915 Surf Ave. Food Mart*, 298 AD2d 282 [2002]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 27, 2009



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